

No. 22,444

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SEP 18 1968

DANIEL H. DEUTSCH and EVELYN M. DEUTSCH, Husband and Wife, ALFRED DEUTSCH and BERNICE DEUTSCH, WILLIAM DRELL and ETHEL DRELL,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of the Decisions of the
Tax Court of the United States.

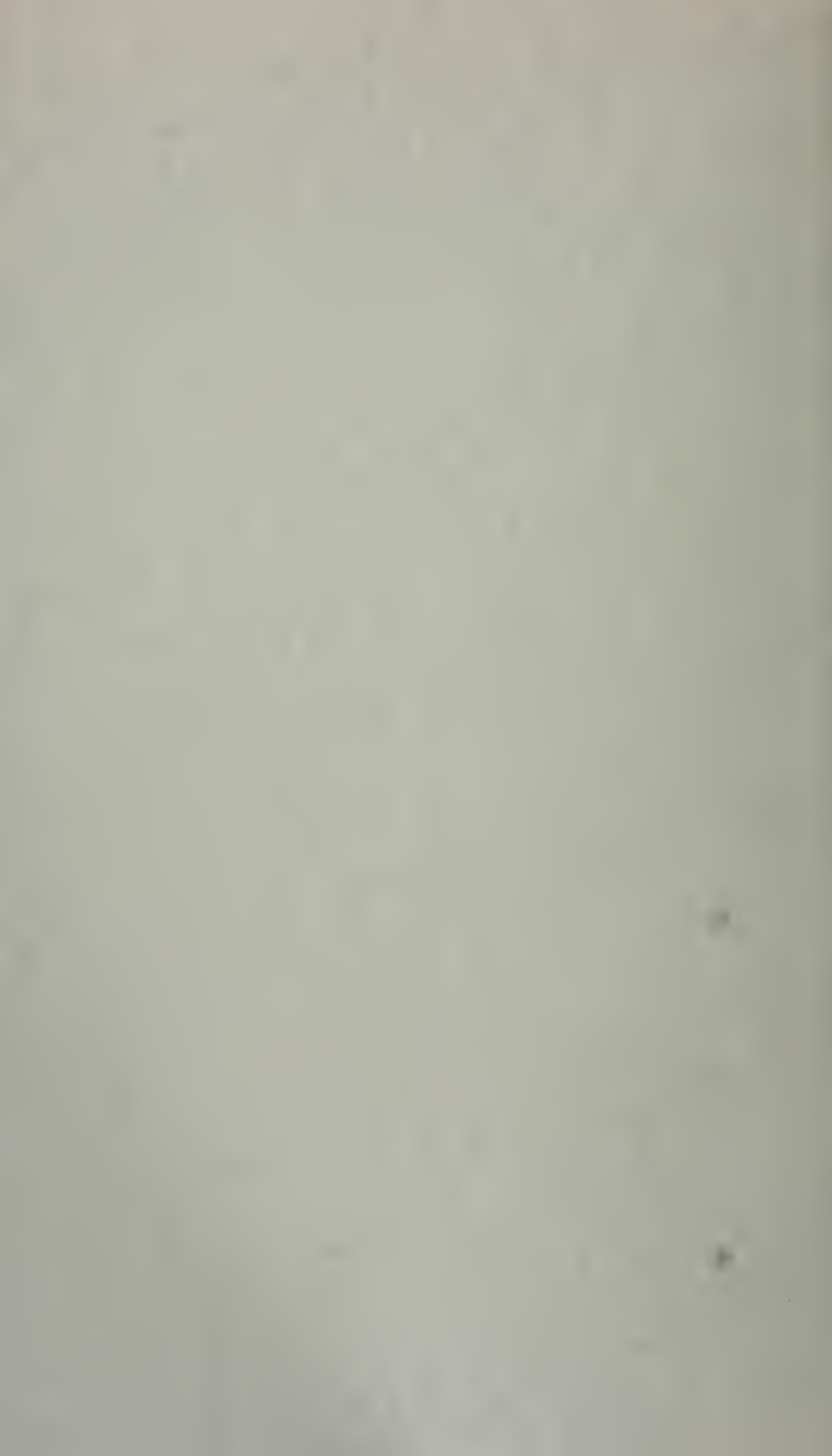
REPLY BRIEF FOR THE PETITIONERS.

FILED

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SEP 9 1968

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<p>The Tax Court Correctly Held That the Contractual Relationship Established Between the Petitioners and Malin Was Valid and Then the Tax Court Failed to Recognize That the Same Contractual Relationship Existed Between the Foundation and the Petitioners. In Effect if Constructive Receipt Was Not Effected in 1959 at Least the Contractual Cost of the Stock to Establish the Base for Capital Gain Was Established in 1959 and Delivery Over of the Stock in 1960 Was to Be Taken Into Taxation by the Petitioners at the Cost Established in 1959</p>	
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TABLE OF AUTHORITIES CITED

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SUMMARY OF ARGUMENT.

The respondent in referring to *Cohu v. Commis-
sioner* in their brief have failed to recognize that Cohu
had no interest and had paid no value for the stock.
Said stock was promotional stock and had no par value
and the par value at the time the release of said stock
would have been the controlling fair market value to be
determined as the basis for capital gains.

The respondent further erred in referring to *Fred
C. Hall v. Commissioner*, 15 T.C. 195 (1950) in that

Hall had merely a right to the stock if he performed the conditions precedent of actually rendering services. Said services had to be rendered prior to delivery of the stock so it was merely a bonus, or petitioner had a right to earn the stock, but services were a prerequisite to his actually having earned the right to title of said stock. This has no application of the present matter.

In the case of the *Estate of Arthur L. Hobson v. Commissioner*, 17 T.C. 854 (1951) the Court recognized the equitable ownership of Langdon and although Hobson held the legal title they did recognize the fact that the stock ownership did belong to Langdon and Langdon was charged with the dividends.

There is a case specifically on point which is the case of *Robert Lehman v. Commissioner*, 17 T.C. 652. In this case Robert Lehman had purchased the stock for \$17,000.00, but it was subject to being delivered after certain restrictions were removed. Said restrictions were removed on the last day of 1943. The stock was sold for approximately sixty odd thousand dollars in March of 1944. The Commissioner attempted to get the evaluation as of January 1944 which would be a greater fair market value than it was at the time of the purchase on the basis that there had been no delivery and had been subject to certain restrictions and therefore denied the base of \$17,000.00. The Court properly held that Lehman had established the contractual price at \$17,000.00 had used that as a base for reporting capital gains and that said reporting was proper.

ARGUMENT.

In reply to the argument of the respondent the Tax Court erred in that it recognized the fact that the petitioners had made an agreement with Malin to sell him the stock at their cost of \$1.00 per share if and when the stock was delivered to them. Malin recognized this by purchasing said stock when it was made available to them in 1960. However, the Court failed to take into consideration the fact that the Foundation had a contract with the petitioners to furnish the stock at \$1.00 per share. They had cancelled out in effect by this agreement the indebtedness due to the petitioners by the Foundation for services rendered prior to the agreement. Therefore, it is inconceivable how you can recognize a contractual agreement to purchase a stock at \$1.00 per share by the petitioners and their agreement to sell to Malin at \$1.00 per share and divide said contract.

In the respondent's very brief on page 11 of said brief, they show the Foundation trustees who were not under the control of petitioners had resolved on March 24, 1960 that the officers be instructed to confer with counsel with the view towards implementing as expeditiously as possible the memo of agreement, dated January 3, 1959. This was complete recognition of the contractual liability and the performance of said liability.

The Commissioner has raised much issue as to constructive receipts. The taxpayers should probably have properly reported the income in 1959, but were under the impression that they could not report it until such time as they had received it. Although they did establish the purchase price at \$1.00 per share. When the stock

was received in 1960 they properly took it into their income as \$1.00 per share and when sold in 1961, they properly reported the difference as capital gain. The portion allotted to Malin was sold to him at \$1.00 per share. The fact that there was a condition subsequent that in the event the corporation was unable after a five year period to release the stock and tender them the stock, that then they would have the possibility of reverting to a claim for salaries against the Foundation, does not constitute any receipt in the future of said stock. The conditions of restriction were known to both the Foundation and the petitioners at the time of the purchase and the agreement was that they would wait for actual delivery of the stock. This they did and when they received it they brought it into their income at the agreed on purchase price.

The petitioners therefore request this Honorable Court to recognize the fact that they had a contract as of January 3, 1959 with the Foundation in that they agreed to participate with Malin in part of that contract. If the Court would recognize the contract of Malin, they must necessarily recognize the contract to the petitioners from the Foundation. No respectful race track would allow a thoroughbred on the track that was three-quarters horse and one-quarter mule, nor can a contract be recognized for twenty-five percent and denied for seventy-five percent, when the same factual situation covers both sides or all aspects of said contract.

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